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# IN THE COURT OF APPEALS OF INDIANA

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| YVONNE LYNN MAXWELL, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A04-0803-CR-166 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79A02-0611-FC-00110

**September 24, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

After being charged with sixteen counts of criminal conduct, Yvonne Maxwell pled guilty to two counts of forgery, a Class C felony, and one count of theft as a Class D felony. The trial court imposed an aggregate sentence of ten years, with four years suspended. Maxwell now appeals her sentence, arguing that the trial court abused its discretion by failing to identify undue hardship to her dependent, H.F., as a mitigator and that her sentence is inappropriate. Concluding that the trial court did not abuse its discretion in sentencing Maxwell and that her sentence is not inappropriate, we affirm.

## Facts and Procedural History

On November 6, 2006, the State charged Maxwell with the following crimes: Count I, Class C felony forgery; Count II, Class C felony forgery; Count III, Class C felony forgery; Count IV, Class C felony forgery; Count V, Class C felony attempted forgery; Count VI, Class C felony fraud on a financial institution; Count VII, theft as a Class D felony; Count VIII, theft as a Class D felony; Count IX, theft as a Class D felony; Count X, theft as a Class D felony; Count XI, attempted theft as a Class D felony; Count XII, receiving stolen property as a Class D felony; Count XIII, conspiracy to commit receiving stolen auto parts as a Class D felony; Count XIV, theft as a Class D felony; Count XV, conspiracy to commit theft as a Class D felony; and Count XVI, Class C felony fraud on a financial institution.

In December 2007, Maxwell pled guilty pursuant to a plea agreement to Count I, Class C felony forgery;[1] Count III, Class C felony forgery;[2] and Count XIV, theft as a

[1] Ind. Code § 35-43-5-2(b).

Class D felony.[3] The State dismissed the remaining charges in exchange for the plea. The plea agreement provided that the sentences would be served consecutively.

At Maxwell's guilty plea hearing, the State established the following factual basis for Counts I, III, and XIV: on September 15, 2006, Maxwell and co-defendant Nicholas Dicks stole some bank checks and other miscellaneous items from Charles and Linda Hall. That same day, Maxwell went to the Industrial Federal Credit Union in Lafayette and cashed one of the stolen checks, made out to herself, for six hundred dollars. The next day she cashed another stolen check, also made out to her for six hundred dollars.

When sentencing Maxwell, the trial court discussed the following aggravating and mitigating factors:

> As mitigating factors --- or I should say as aggravating factors the court finds that the defendant has a history of criminal or delinquent behavior and the defendant has recently violated the probation and pre-trial release. Violated probation by committing a new crime, you violated pre-trial release [in this case] by skipping the county and having --- you had to be brought back from Ohio. The mitigating factor is the defendant's mental illness. The court finds that the aggravating factors outweigh the mitigating factors. I have not --- I'm not the juvenile court. This case is a completely independent crime from any issue that resulted [in the] loss of your children. You've already lost three of the five children --- really four because --- and the only hope, the only reason that you're being considered as a parent is that the fifth child is so difficult that his father can't handle him. Well, you've shown no reason why we should be hopeful about your ability to step in and care for him since these crimes were committed while that was in play. And this is certainly not a helpful sign in that.

Sentencing Tr. p. 22.

The trial court sentenced Maxwell to consecutive terms of four years for each forgery and two years for the theft, resulting in an aggregate sentence of ten years. As for

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[2] *Id.*

[3] Ind. Code § 35-43-4-2(a).

placement, the trial court sentenced Maxwell to four years executed in the Department of Correction ("DOC"), two years executed in Tippecanoe Community Corrections, and four years of probation. Maxwell now appeals her sentence.

## Discussion and Decision

Maxwell raises two issues on appeal: (1) whether the trial court abused its discretion by failing to identify undue hardship to her dependent child as a mitigator and (2) whether her sentence is inappropriate.

### I. Hardship to Maxwell's Dependent

Maxwell contends that the trial court abused its discretion by failing to find that Maxwell's imprisonment would result in undue hardship to H.F., her dependent child. Specifically, Maxwell argues that the "undue hardship of leaving H.F. 'legally orphaned' was clearly supported by the record, and the trial court's reasons for disregarding that hardship were clearly *not* supported . . . ." Appellant's Br. p. 10. We disagree.

In general, sentencing decisions lie within the discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). As such, we review sentencing decisions only for an abuse of discretion. *Id.* An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Id.* (quotation omitted).

With regard to Maxwell's dependent, a trial court "is not required to find a defendant's incarceration would result in undue hardship on his dependents." *Davis v. State*, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), *trans. denied*. Indeed, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999).

Maxwell has failed to establish that the mitigating evidence is both significant and clearly supported by the record. Prison is always a hardship on dependents. *See Vazquez v. State*, 839 N.E.2d 1129, 1234 (Ind. Ct. App. 2005), *trans. denied*. According to Maxwell, the court should have found undue hardship in her case because imprisonment would result in making H.F. a "legal orphan." Appellant's Br. p. 8. At the sentencing hearing, the Department of Child Services ("DCS") caseworker for H.F. testified that if the trial court sentenced Maxwell to imprisonment instead of community corrections or house arrest, she would have to petition for the termination of Maxwell's parental rights, as required by Indiana Code § 31-35-2-4.5(a)(2)(B). Sentencing Tr. p. 17. The caseworker also testified that if the trial court released Maxwell, then Maxwell and H.F. would be reunited. *Id.* at 10.

Maxwell argues that these are special circumstances because Maxwell's sentence "would seal the fate of her parent-child relationship with H.F. – reunification or termination." Appellant's Br. p. 8. However, we note that Maxwell's executed sentence does not necessarily terminate Maxwell's parental rights as she argues. Although Indiana Code § 31-35-2-4.5 does require a DCS caseworker to *petition* to terminate the parent-

child relationship if a child in need of services has been removed from a parent and has been in the department's care for at least fifteen of the most recent twenty-two months, the matter must still be set for a *hearing*. Ind. Code § 31-35-2-6. Maxwell will have an opportunity to be heard as to whether the court should decide to sever her parent-child relationship. Ind. Code § 31-35-2-6.5(e). The juvenile court will then decide whether there is a satisfactory plan for H.F.'s care and whether termination is in H.F.'s best interests. Ind. Code §§ 31-35-2-4(b)(2), -8(a).

We also note that H.F., her oldest child, was removed from Maxwell for reasons unrelated to this case in 2006. DCS did not know Maxwell's location until October 2007 when she was arrested in Ohio. H.F. first lived with his father, but soon after his father rejected him in July 2007, Maxwell absconded to Ohio, violating her bond and missing court dates, leaving H.F. behind in DCS care. The trial court issued a warrant for her arrest on September 7, 2007, which was served on her in Ohio over a month later. She was then brought back to Indiana to enter her guilty plea in court. As for Maxwell's other children, her parental rights have already been terminated for the middle three of her five children and the youngest child is in his father's custody. Maxwell has not provided evidence of her support for H.F. to the trial court, so it is not clear how her imprisonment would be more of a hardship than her previous absence from H.F.'s life has been. Accordingly, the trial court did not abuse its discretion by failing to identify hardship to Maxwell's dependent as a mitigator.

Nonetheless, it is clear from the record that even if the trial court abused its discretion by failing to identify undue hardship to H.F. as a mitigator, any such error is

harmless in light of the other aggravating circumstances found by the trial court. Because the trial court identified two other aggravators that Maxwell does not challenge, we are confident that the trial court would have imposed the same sentence had it found undue hardship as a mitigator. *See Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007).

## II. Placement in DOC

Maxwell also contends that her sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

On appeal, Maxwell argues that because H.F. will continue to be in DCS care for the fifteen months that will eventually require DCS to file a termination petition, her placement in the DOC for four years "deprives [H.F.] of his mother not just for the term of her incarceration, but *forever*." Appellant's Br. p. 10. Instead, she asks us to follow the Probation Department's recommendation and impose an eight-year term with credit for time served. Under the recommendation, Maxwell would serve three years executed

in a Community Corrections placement, such as home detention, and four years on probation.

The location where a sentence is to be served is an appropriate focus for application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). Nonetheless, we note that it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate. This is because the question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate.[4] *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant challenging the placement of a sentence must convince us that the given placement is itself inappropriate. *Id.*

Instead of imposing the sentence proposed by Maxwell and the Probation Department, the trial court denied the request, citing Maxwell's history of criminal behavior and probation violations, declaring, "I'm not going to impose a harsher sentence than the State has requested but I believe the sentence the State has requested is a --- more than fair." Sentencing Tr. p. 23. The trial court decided four years of Maxwell's sentence should be executed in the DOC instead of Community Corrections. After due consideration of the trial court's decision, we cannot say that Maxwell's sentence is inappropriate.

Although there is nothing particularly egregious about the nature of the offense, Maxwell's character proves otherwise. She has a history of numerous prior convictions,

[4] Maxwell also argues that placement in Community Corrections instead of the DOC "would serve the [Indiana Constitution's] Article I, § 18 'principles of reformation' for Ms. Maxwell better than anything the criminal system has to offer." Appellant's Br. p. 6. However, as our Supreme Court has noted before, "our precedents have held that art. 1, § 18, applies only to the penal code as a whole, not to individual sentences." *Henson v. State*, 707 N.E.2d 792, 796 (Ind. 1999).

including six convictions for operating while suspended as a Class A misdemeanor, and two convictions for check deception as a Class A misdemeanor. Maxwell violated her probation and the terms of her pre-trial release by travelling to Ohio and missing her court date, leading to her arrest and return to Indiana. Although the trial court identifies Maxwell's mental illness as a mitigator, it is not clear from the record that there is a nexus between her mental illness and the crimes she committed. *See Barany v. State*, 658 N.E.2d 60, 67 (Ind. 1995). In sum, Maxwell has not carried her burden of persuading this Court that her sentence is inappropriate based upon her character and the nature of the offenses she committed.

Affirmed.

KIRSCH, J., and CRONE, J., concur.